Supreme Court, U.S.
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No. 09-1119

In The
Supreme Court of the United States

CARLOS FITZGERALD SMITH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

Andrew Banzhoff
Counsel of Record
DEVEREUX & BANZHOFF, PLLC
The Jackson Building
22 South Pack Square, Suite 1100
Asheville, North Carolina 28801
(828) 285-9455

Counsel for Petitioner ***Dated: September 15, 2009***

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

I. WHETHER A MISTAKE OF LAW CAN PROVIDE AN OFFICER WITH A REASONABLE SUSPICION UNDER THE FOURTH AMENDMENT TO STOP THE PETITIONER'S VEHICLE?

II. WHETHER THE OFFICER'S SEARCH OF THE PETITIONER'S VEHICLE EXCEEDED THE PERMISSIBLE SCOPE OF THE SEARCH AS AUTHORIZED BY THE FOURTH AMENDMENT?

LIST OF PARTIES TO THE PROCEEDING

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PETITION FOR WRIT OF CERTIORARI

NOW COMES CARLOS FITZGERALD SMITH, Petitioner herein, and requests that this Court issue a Writ of Certiorari to the North Carolina supreme Court to review its order filed on June 17, 2009, denying the petitioner's Petition for Discretionary Review from a decision of North Carolina Court of Appeals which affirmed the trial court's denial of his motion to suppress evidence.

OPINIONS BELOW

The North Carolina Court of Appeals issued an opinion affirming the denial of the petitioner's motion to suppress on September 16, 2008. *State of North Carolina v. Smith*, ___ N.C. App. ___, 666 S.E.2d 191 (2008), reproduced at App. 3. The North Carolina Supreme Court issued an order on June 17, 2009 denying the petitioner's Petition for Discretionary review, reproduced at App. 1. *State v. Smith*, 2009 N.C. LEXIS 364 (N.C. June 17, 2009).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Supreme Court Rules. The order to be reviewed is the opinion of the North Carolina Court of Appeals which affirmed the denial of the petitioner's motion to suppress, entered June 17, 2009.

CONSTITUTIONAL AUTHORITY INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

STATEMENT OF THE CASE

The petitioner was indicted by a Grand Jury sitting in Buncombe County, North Carolina, in two Bills of Indictment filed on March 5, 2007. The petitioner was charged with Possession of Firearm by Felon and the sentencing enhancement of having attained the status of Habitual Felon. The case was called for trial during the September 4, 2007 term of court. The petitioner filed a motion to suppress arguing that he had not been lawfully stopped and that the officers' exceeded the scope of the search. These motions were denied. The petitioner was later convicted by a jury and sentenced to a term of 70-93 months. The petitioner filed a timely appeal.

On appeal, to the North Carolina Court of Appeals, the petitioner argued, *inter alia*, that the trial court erred in denying his motions to suppress. The Court of Appeals issued a decision on September 16, 2008, affirming the conviction and sentence. The petitioner thereafter filed a Petition for Discretionary Review with the North Carolina Supreme Court. On June 23, 2009, the North Carolina Supreme Court issued an order declining to grant the petition.

STATEMENT OF THE FACTS

On January 13, 2007, Asheville Police Officer Nathan Anderson was on patrol in South Asheville. He observed a blue Ford F-150 quad cab turning onto Brooklyn Road from West Chapel Road. He indicated that the "registration plate on the vehicle wasn't to the standards of North Carolina." He testified that he was not familiar with tags that were issued by the State of Georgia and that he was not aware that vehicles which were registered in another state comply with the tag requirements in North Carolina. He testified that he could not read any of the words printed on the tag, including the name of the car dealer or the words "Atlanta" or "Union City" which were printed on the tag. He indicated that "North Carolina requires a month, day and year of expiration, and a set number." He was able to read "February 10, 2007." Despite this, he stopped the vehicle. The defendant was driving the vehicle. Officer Anderson testified that when he approached the vehicle he noticed a "mild to moderate" odor of marijuana coming form the interior of the vehicle.

The defendant gave him his paperwork without any difficulty. The officer checked both the vehicle identification number, the vehicle registration and the defendant's drivers license and there were no problems. Officer Anderson then began to write a warning ticket for the defendant. He gave him the warning ticket and then "[he] pulled him out of the vehicle and conducted a pat down for my safety." The officer indicated that he had delayed writing the warning ticket in order to allow other Asheville Police Officers, Officer Maltby and Officer McCabe to arrive.

Officer Anderson informed the defendant that he had smelled an odor of marijuana and asked the defendant for consent to search the vehicle. The defendant informed the officer that he was mistaken about the smell, that it was an air freshener and that he would not provided his consent for the officers to search the vehicle.

At this point, Officer Anderson instructed the defendant that he had probable cause to search the vehicle based upon the alleged smell of marijuana and that the officers were going to search the vehicle. Officer Maltby indicated that he noticed that the defendant was eating an orange, and that he could smell the odor of the orange and it was "overwhelmeing." After this scent wore off, he indicated that he could smell a light odor of marijuana coming from the cab. The officers searched the passenger cab of the vehicle and found nothing. The officers then went to the bed of the pick-up truck, which was covered by a tonneau cover, and lifted it up. Officer Maltby looked in, then turned to the defendant and asked him if "...everything back here [is] yours?" The defendant responded "Uh, yes it is."

Officer Anderson was asked about any smell emanating from the bed of the pick-up and he indicated that he only noticed an odor some time later when the defendant was placed in custody. He described this smell as a "significant odor" of marijuana. He indicated that the bed of the pick-up contained a large amount of clothing. Officer Maltby began searching the contents of the bed and found a camouflage jacket near the right side of the tailgate. He indicated that if felt heavy and that he found a

handgun rolled up inside the jacket. The court asked the officer if it was accessible by the driver while he was "under the wheel" and the officer confirmed that the driver would have to get out of the vehicle in order to access it.

When asked about the handgun, the defendant denied that it was his gun. He advised that the handgun belonged to his girlfriend Shannon Norman, a DSS worker from Atlanta, Georgia, and that she had been riding with him in the truck earlier that evening. Officer Maltby spoke to her that evening and she acknowledged that the gun belonged to her. She further indicated that she had not given it to Mr. Smith. He indicated that he did not know that the gun was in the truck. The gun was found along with a holster. Inside the holster, the officers found a little pouch which contained a registration for the firearm showing that the gun was registered to Shannon Norman.

Ms. Norman testified that they her family lives in Pisgah Forest, North Carolina. She and the defendant traveled up from their home in Union City, Georgia. The defendant worked late, so she packed up the truck, including wrapping her firearm in a jacket and placing it in the truck. She indicated that she wrapped up the gun in the jacket because at the time she was packing, her small child was running around with her outside. She stated that she never told the defendant that the gun was in the truck. The defendant immediately told the officers that gun belonged to Ms. Norman. He also testified that he did not know that the gun was in the truck and that when he confirmed that the contents of the rear of the

truck were his, he was of the belief that only his clothes, his shoes, and his Play Station video games were in the truck.

REASONS WHY THE WRIT SHOULD ISSUE

I. THE APPELLATE COURT IMPROPERLY DETERMINED THAT THE PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY A MISTAKE OF FACT, WHEN THE PETITIONER'S STOP WAS ACTUALLY UNLAWFULLY PREDICATED UPON A MISTAKE OF LAW.

Officer Anderson asserted that he stopped the petitioner because the temporary tag affixed to the vehicle "wasn't to the standards of North Carolina." Ostensibly, the officer believed that he had probable cause to believe that the petitioner was in violation of North Carolina's vehicle registration statute. The petitioner concedes that the officer would be justified in stopping a vehicle if the driver committed a traffic offense. *See Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Conversely, the state cannot rely upon the officer's erroneous belief that the petitioner committed a traffic offense as a legitimate basis for the stop. *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006). Thus, the inquiry is very simply whether the petitioner's vehicle was properly registered.

At the outset, the petitioner notes that the state's evidence showed very clearly that the vehicle

was properly registered in the State of Georgia. Moreover, the state made no effort to argue that the vehicle was not properly registered nor that the tag affixed to the vehicle was insufficient under Georgia law. The State repeatedly pointed to the argument that the plate was improper under North Carolina law. The petitioner submits that since the vehicle was properly registered under the laws of the State of Georgia, it was necessarily entitled to reciprocity under N.C.G.S. § 20-4.8, which reads in pertinent part: "...any vehicle properly registered or licensed in such other jurisdiction... when operated in this State, the same exemptions, benefits, and privileges granted by such other jurisdiction to vehicles properly registered in this State..." The effect of this statute is to essentially allow vehicles which are properly registered in other states to be deemed properly registered for the purpose of traveling in North Carolina. Thus, since the vehicle was properly registered in Georgia, it is entitled to be considered properly registered when it travels in North Carolina. As a result, if the vehicle is properly registered under the laws of any state, a stop based upon this ground is not objectively reasonable.

The petitioner further submits that the facts of this case are remarkably similar to the facts of *United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000). In that case, a South Carolina officer observed the defendant operating a vehicle with a North Carolina temporary tag. He followed the vehicle for a period of time but could not read the expiration date. There was no evidence that the tag was concealed, improperly displayed, smudged or faded by age. The officer observed no other traffic violation and initiated the

vehicle stop solely because he could not read the expiration date. *Id.* at 722. The Fourth Circuit determined that these facts were insufficient to support a conclusion that the officer had a reasonable suspicion of a violation. *Id.* at 724.

The petitioner asserts that the, the Court of Appeals incorrectly applied the law to the facts of this case. The panel determined that Officer Anderson had reasonable suspicion to stop the petitioner's vehicle. In reaching that conclusion, the panel determined that Officer Anderson was reasonable in his conclusion that the Georgia temporary tag which was on the petitioner's vehicle was insufficient under North Carolina law. The petitioner asserts that the Court of Appeals incorrectly seemed to denominate this as a mistake of fact. In actuality, this case presents a mistake of law.

While the temporary tag at issue herein may well not have been in compliance with the statutes which apply to North Carolina dealers who issue temporary tags, N.C.G.S. § 20-4.8 clearly extends reciprocity to vehicles which are properly registered in another state. Officer Anderson testified at the trial that the vehicle was properly registered in Georgia, and at no time, either in the trial court nor in the Court of Appeals has the State contended that the temporary tag was improper under Georgia law. For reasons that are unknown to the petitioner herein, the panel decision ignores the fact that N.C.G.S. § 20-4.8 recognizes the reciprocity of proper vehicle registrations in another state.

More to the point, the panel decision also cites a federal circuit decision for the proposition that a mistake of fact can support reasonable suspicion. *United States v. Chanthasouxat*, 342 F.3d 1271 (11th Cir. 2003). The petitioner submits that the panel decision of the Court of Appeals mistakenly interpreted the instant case as being one of a mistake of fact. Officer Anderson was not mistaken about the contents of the tag, which would have been a mistake of fact; he was mistaken about the legal effect of the contents of the tag. It is clear that North Carolina law recognizes that vehicles which are properly registered in another state are afforded the same privileges as if the vehicle was registered in North Carolina. Therefore, Officer Anderson's stop of the petitioner was only reasonable if the officer possessed articulable suspicion that the Georgia temporary tag was improper under Georgia law. As to this point, the State has previously conceded that the vehicle was properly registered in Georgia. As a result, the stop of the petitioner's vehicle was predicated by the officer's improper understanding of the reciprocity law. Under applicable law in this State and in the federal circuits, a mistake of law cannot form the basis for reasonable suspicion. *State v. Ivey, supra*; *See also United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000) (stop of vehicle by California officer was unlawful where he assumed that Michigan required a front license tag) and *United States v. Chanthasouxat, supra*. (Officer's stop of vehicle unreasonable where he mistakenly believed that Alabama required an inside mirror).

The petitioner herein was operating a vehicle with a tag that was not concealed, improperly

displayed, smudged or faded by age. *See State v. Hudson*, 103 N.C. App. 708, 407 S.E.2d 583 (1991) (upholding the stop of vehicle based upon faded temporary tag). Officer Anderson never indicated that he observed any other traffic violation. His sole basis for stopping the petitioner was his belief that the vehicle's temporary tag was not in compliance with North Carolina law. As previously noted, the conclusion that the tag was legally insufficient was an erroneous mistake of law. In applying an objective standard to these facts, the officer simply lacked any reasonable suspicion to believe the vehicle was engaged in criminal activity or probable cause to believe that the petitioner had violated a traffic offense. As a result, the stop of the defendant was unreasonable and thus in violation of the petitioner's constitutional rights.

II. THE OFFICERS' SEARCH OF THE BED OF THE TRUCK DRIVEN BY THE PETITIONER EXCEEDED THE PERMISSIBLE SCOPE OF THE SEARCH AS AUTHORIZED BY THE FOURTH AMENDMENT.

Following the stop of the vehicle, Officer Anderson indicated at different times that he smelled a "weak to moderate" and a "mild to moderate" odor of marijuana coming from the cab of the pick-up. Assuming, *arguendo*, that there actually was an odor

of marijuana,[1] the petitioner concedes that this odor provided sufficient probable cause to support a search of the cab area. *See State v. Downing*, 169 N.C. App. 790, 796, 613 S.E.2d 35 (2005) ("Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search") (citations omitted). However, neither officer indicated that there was any odor of marijuana emitting from the bed of the pick-up. In fact, other than a discussion of an odor that was allegedly observed following the opening of the bed cover, the only evidence is that the there was a "weak to moderate" odor of marijuana coming from the cab area. The officers never indicated that they observed an odor coming from the bed area.

The scope of a lawful search has been defined as such: "The scope of a warrantless search of an automobile thus...is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982), *see also State v. Isleib*, 319 N.C. 364, 356 S.E.2d 573 (1987). The Court in *Ross* further articulated the point by illustrating that "[p]robable

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[1] The officers' testimony regarding the alleged odor of marijuana is conflicting, at best. First of all, their statements regarding the odor are wildly divergent. Officer Maltby clearly indicates that the defendant was eating an orange and that the smell of the odor was "overwhelming." Officer Anderson never even mentions the smell of the orange. Secondly, Officer Maltby indicates that the smell was only apparent once the smell of the orange "wore off." Thus, it would not have been immediately observable to Officer Anderson upon his initial encounter with the defendant, despite his testimony. Lastly, no marijuana was ever found.

cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire vehicle." 456 U.S. at 824. These principals are highly instructive in the instant case.

The scope of the search herein is necessarily limited to areas which could have contained marijuana and from which an odor of marijuana could have been observed inside the cab of the truck. The bed area herein simply does not meet this definition. An enclosed bed is fundamentally different from the trunk area of a passenger vehicle, because the bed area is completely enclosed and is completely separate from the passenger compartment in the cab. As a result, it is not logical to conclude that an odor that is observed emitting from the cab area could reasonably be thought to have originated from the bed area. To put it more succinctly, if the odor is observed in the cab and is not observed in the bed area (prior to opening the cover) there is no probable cause to believe that the bed area contains marijuana.

CONCLUSION

The petitioner respectfully requests that this Court grant his Petition for Certiorari to review the decision of the North Carolina Court of Appeals which the petitioner submits erroneously affirmed the trial court's ruling which failed to suppress evidence admitted against the petitioner in violation of the petitioner's Fourth Amendment rights.

Respectfully Submitted,

Andrew B. Banzhoff
Counsel of Record
DEVEREUX & BANZHOFF, PLLC
The Jackson Building
22 South Pack Square Suite 1100
Asheville, North Carolina 28801
(828) 285-9455

September 15, 2009

No. _____

In The
Supreme Court of the United States

CARLOS FITZGERALD SMITH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Andrew Banzhoff
Counsel of Record
DEVEREUX & BANZHOFF, PLLC
The Jackson Building
22 South Pack Square, Suite 1100
Asheville, North Carolina 28801
(828) 285-9455

Counsel for Petitioner

Dated: September 15, 2009

THE LEX GROUP[DC] ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

APPENDIX:

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The North Carolina Court of Appeals
entered September 16, 2008 .....App. 3

Judgment of
The General Court of Justice,
Superior Court Division, for
The State of North Carolina
entered September 6, 2007 .....App. 13

[given: June 17, 2009]
[entered: June 23, 2009]

No. 486P08 TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

(State v Carlos Fitzgerald Smith)

STATE OF NORTH CAROLINA
v
CARLOS FITZGERALD SMITH

From NC Court of Appeals
(08-21)
From Buncombe
(07CRS00149, 07CRS50503)
****

ORDER

Upon consideration of the petition filed on the 20th day of October 2008 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 17th day of June 2009.

s/ Hudson, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of June 2009.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Andrew B. Banzhoff, Attorney at Law, For Smith (by E-Mail)
Mr. Richard E. Slipsky, Assistant Attorney General, For State of NC (by E-Mail)
Mr. Ronald L. Moore, District Attorney
Mr. Robert H. Christy, Jr., Clerk of Superior Court
West Publishing Company (By E-mail)
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NO. COA08-21

NORTH CAROLINA COURT OF APPEALS

[entered: September 16, 2008]

STATE OF NORTH CAROLINA

v.

CARLOS FITZGERALD SMITH

Buncombe County
Nos. 07 CRS 00149
07 CRS 50503

Appeal by defendant from judgments entered on or after 6 September 2007 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Devereux & Banzhoff, P.L.L.C., by Andrew B. Banzhoff, for defendant-appellant.

HUNTER, Judge.

Carlos Fitzgerald Smith ("defendant") appeals from judgments entered after: (1) a jury found him to be guilty of possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1 and (2) he pleaded guilty to habitual felon status pursuant to N.C. Gen.

Stat. § 14-7.1. We affirm in part and hold there is no error in part.

I. Background

On 13 January 2007, at approximately 1:50 a.m., Officer Nathan Anderson ("Officer Anderson") of the Asheville Police Department observed that "the registration plate on [a blue Ford F-150 pick-up truck] wasn't to the standards of North Carolina." Officer Anderson stopped the vehicle, approached the driver's side window, received defendant's license and registration, and returned to his cruiser to verify the information. After Officer Anderson reviewed defendant's documentation, he returned to defendant's vehicle and issued him a warning ticket for failing to display a proper registration tag. The tag was a temporary tag, issued by the state of Georgia. The warning ticket stated that defendant's tag was improper and that "he needed to get it taken care of as soon as he could."

Two additional officers arrived on the scene and Officer Anderson informed defendant that he had smelled an odor of marijuana coming from the vehicle. Officer Anderson requested and defendant denied consent to search defendant's vehicle. Officer Anderson informed defendant that probable cause existed to search his vehicle without consent. The other two officers conducted a search and recovered a handgun in the bed of defendant's vehicle. The bed was fitted with a lift-up cover. The officers did not locate any marijuana. At this point, defendant, who had prior felony convictions, was arrested for possession of a firearm by a convicted felon.

Defendant was indicted for possession of a firearm by a convicted felon and also for having attained habitual felon status.

At a 4 September 2007 suppression hearing, defendant argued the initial stop of his vehicle was improper and all evidence obtained as a result of that stop should be suppressed. The trial court denied defendant's motion to suppress. On 6 September 2007, the jury found defendant to be guilty of possession of a firearm by a felon. Defendant pleaded guilty to attaining habitual felon status, reserving his right to appeal the underlying conviction. Defendant was sentenced to a minimum term of 70 and a maximum term of 183 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it denied his motions to suppress and to dismiss.

III. Motion to Suppress

Defendant argues the trial court should have granted his motion to suppress evidence "obtained following an unlawful stop of ... defendant's vehicle." We disagree.

A. Standard of Review

> The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This

> Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is de *novo*.

State v. Edwards, __ N. C. App. __, ___, 649 S.E.2d 646, 648
(internal citations and quotation omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

B. Validity of the Traffic Stop

Defendant argues the validity of Officer Anderson's traffic stop is governed by a probable cause standard. Recently however, our Supreme Court, in *State v. Styles,* held that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected."___ N.C. ____, ___, ___ S.E.2d ____, ___ (Aug. 27, 2008) (442A07) (citations and footnote omitted). Our Supreme Court stated

> The Fourth Amendment protects individuals against unreasonable searches and seizures and the North Carolina Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1,

> 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.
>
> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances - the whole picture in determining whether a reasonable suspicion exists.

Id. at ___, ___ S.E.2d at ___ (internal citations and quotations omitted).

To determine whether Officer Anderson had a reasonable suspicion to stop defendant, this Court must review the alleged violations of North Carolina traffic laws. N.C. Gen. Stat. § 20-50(a) (2007) requires "[a] vehicle intended to be operated upon any highway of this State [to] be registered with the Division [of Motor Vehicles of the Department of Transportation]. . . ." N.C. Gen. Stat. § 20-79.1(c)

(2007) requires the face of a temporary registration plate to state "clearly and indelibly . . . [:] (1) [t]he dates of issuance and expiration; (2) [t]he make, motor number, and serial numbers of the vehicle; and (3) [a]ny other information that the Division may require." A violation of either N.C. Gen. Stat. § 20-50 or N.C. Gen. Stat. § 20-79.1 is a misdemeanor offense. N.C. Gen. Stat. § 20-176(a) (2007).

Here, the objective facts establish: (1) it was 1:50 a.m. and dark when Officer Anderson noticed defendant's "registration tag[;]" (2) defendant's registration tag "was just a piece of paper with 'February '07' written on it[;]" and (3) the tag "wasn't a piece of cardboard that North Carolina [automobile] dealers normally hand out when a vehicle is purchased[.]" Based on the objective facts and the "totality of the circumstances[,]" Officer Anderson possessed reasonable suspicion to believe that defendant was operating his vehicle with an improper registration tag. *Styles,* N.C. at S.E.2d at *see also United States v. Chanthasouxat,* 342 F.3d 1271, 1276 (11th Cir. 2003) ("A traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment." (Citations omitted)).

C. Validity of Search

Having determined that Officer Anderson's traffic stop was justified, we must determine whether the warrantless search of defendant's vehicle after the stop was supported by probable cause.

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) ("[The Court of Appeals] correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug.").

Here, Officer Anderson testified that "[w]hen I made my initial approach to the vehicle I got an odor of marijuana coming from the interior of the vehicle." Based on our Supreme Court's holding in *Greenwood*, once Officer Anderson detected the "odor of marijuana" as he approached defendant's vehicle, probable cause existed for Officer Anderson and the other officers to conduct a warrantless search of defendant's vehicle. 301 N.C. at 708, 273 S.E.2d at 441. The trial court properly denied defendant's motion to suppress.

IV. Motion to Dismiss

Defendant argues the trial court erred when it failed to grant defendant's motion to dismiss "where the State failed to present substantial evidence of defendant's constructive possession[]" of the handgun. We disagree.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that

> defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

B. Analysis

"Possession may either be actual or constructive. When the defendant, while not having actual possession, ... has the intent and capability to maintain control and dominion over the property, he has constructive possession of the item." *State v. Glasco,* 160 N.C. App. 150, 156, 585 S.E.2d 257, 262 (internal quotation omitted), *disc. rev. denied,* 357 N.C. 580, 589 S.E.2d 356 (2003). "This Court has previously emphasized that constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Id.* at 156-57,585 S.E.2d at 262 (citations and quotations omitted).

"As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 479 (1986). In testing the sufficiency of the evidence, the test to be used "is the same whether the evidence is direct, circumstantial or both." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). Evidence favorable to the State is to be considered as a whole in determining its sufficiency. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Here, the State presented evidence which tended to show: (1) defendant was the owner and driver of the vehicle; (2) defendant had exclusive control of the vehicle; (3) the cargo area of the vehicle contained other objects owned by defendant; (4) defendant stated everything in the cargo area belonged to him; and (5) the handgun was found in the cargo area wrapped in a man's jacket.

The State presented sufficient evidence for the jury to determine whether defendant possessed the handgun. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court properly denied defendant's motion to dismiss. *Id.* This assignment of error is overruled.

V. Conclusion

Based on the "totality of the circumstances[,]" Officer Anderson possessed "a reasonable, articulable suspicion that" defendant was operating his vehicle with an improper registration tag. *Styles*, N.C. at S.E.2d at Officer Anderson's traffic stop was

justified and the seizure of the handgun discovered during the search was lawful. *Id.* Competent evidence supports the trial court's findings of fact, which support its conclusions of law. *Edwards*, ___ N.C. App. at ___, 649 S.E.2d at 648. The trial court's denial of defendant's motion to suppress is affirmed.

The State presented sufficient evidence for the jury to determine whether defendant had actual or constructive possession of the handgun found in the cargo area of defendant's vehicle. The trial court properly denied defendant's motion to dismiss. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We hold there is no error in the jury's verdict or the judgment entered thereon.

Affirmed in part and no error in part.

Judges TYSON and JACKSON concur.

[entered: September 6, 2007]

STATE OF NORTH CAROLINA

No. 07CRS050503 51

BUNCOMBE County ASHEVILLE Seat of Court

In The General Court Of Justice
☐ District ☒ Superior Court Division

NOTE: *(This form is to be used for* (1) *felony offense(s), and* (2) *misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).)*

STATE VERSUS

Name Of Defendant
SMITH, CARLOS, FITZGERALD

Race B *Sex* M *DOB* 8/3/1970

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT
FELONY
(STRUCTURED SENTENCING)

GS, 15A-1301, 15A-1340.1:

Attorney For State
HESS, CHRISTOPHER

☐ *Def. Found Not Indigent* ☐ *Def. Waived Attorney*

Attorney For Defendant
SMITH, ROGER

☒ *Appointed* ☐ *Retained*

The defendant ☐ pled guilty to: ☒ was found guilty of: ☐ pled no contest to:

File No.(s) 07CRS050503 Off. 51

Offense Description
POSSESSION OF FIREARM BY FELON

Offense Date 1/13/2007

G.S. No. 14-415.1 F/M F CL. G

* **NOTE:** *Enter punishment class if different from underlying felony class (punishment class represents a status or enhancement).*

The Court: (**NOTE:** *Block 1 or 2 MUST be checked.*):

☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 8. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL:

☐	**I**	☒	**III**	☐	**V**
☐	**II**	☐	**IV**	☐	**VI**

The Court: (**NOTE:** *Block 1 or 2 MUST be checked.*):

☐ 1. makes no written findings because the prison term imposed is: ☐ (a) within the presumptive range of sentences authorized under G.S. 15A-1340.17(c). ☐ (b) for a class A felony. ☐ (c) for an adjudication as a violent habitual felon. G.S. 14-7.12. ☐ (d) for drug trafficking offenses.

☒ 2. makes the aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605.

☐ 3. imposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).

☒ 5. adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14.

☐ 6. finds enhanced punishment pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 7. finds that the defendant used, displayed, or attempted to use or display a firearm at the

time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 8. finds the defendant is classified as a recidivist. G.S. 14-208.6.

☐ 9. finds this is an aggravated offense. G.S. 14-208.6.

☐ 10. finds the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6.

☐ 11. finds the defendant is classified as a sexually violent predator. G.S. 14-208.20.

☐ 12. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and this conviction shall be reported to DMV.

☐ 13. finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

for a minimum term of: 70 months
for a maximum term of: 93 months

☐ Class A Felony:
- ☐ *Life Imprisonment Without Parole*
- ☐ *Death (see attached Death Warrant and Certificates)*

☐ Class B1 Felony: *Life Imprisonment Without Parole*

☐ Violent Habitual Felon: *Life Imprisonment Without Parole*

in the custody of:
- ☐ N.C. DOC
- ☐ Sheriff pursuant to G.S. 15A-1352(b)
- ☐ Other _____

The defendant shall be given credit for __0__ days spent in confinement prior to the date of this Judgment as a result of this

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File Number *Offense* *County* *Court* *Date*

Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

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(check all that apply)

☐ 1. The defendant shall pay the costs.
☐ 2. The defendant shall pay a fine of $_____
☐ 3. The defendant shall submit to satellite-based monitoring. (AOC-CR-615 required)

The Court recommends:

☐ 3. Assignment to a substance abuse treatment unit. G.S. 15A-1351(h) *(applies only to offenses committed before December 1, 2003).*
☐ 4. Psychiatric and/or psychological counseling.
☐ 5. Work Release.
☐ 6. Payment as a condition of post release supervision, if applicable, or from work release earnings, if applicable, of the items and amounts set out below.

Fine	*Court Costs*	*Restitution**
$	$	$
Attorney's Fee	*GPS Fee*	*Total Amount Due*
$	$	$

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

The Court further recommends:

The Court does not recommend:

☐ 1. Restitution as a condition of post release supervision or work release.
☐ 2. Work release.

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☐ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counselor assigned public defender.

ORDER OF COMMITMENT/APPEAL ENTRIES

☒ It is ORDERED that the Clerk deliver **two** certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☒ The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	*Name Of Presiding Judge (Type Or Print)*
9/6/2007	JAMES U. DOWNS

Signature Of Presiding Judge
/s/ James U. Downs

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed

Date Withdrawal Of Appeal Filed

Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency **two** certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date *Signature*

☐ *Deputy CSC* ☐ *Assistant CSC*
☐ *Clerk Of Superior Court*

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☒ Appeal Entries (AOC-CR-350)
☒ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)

☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Victim Notification Tracking Form
☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ Judicial Findings And Order As To Satellite-Based Monitoring For Sex Offenders – Lifetime Monitoring/Judicial Findings And Order As To Satellite-Based Monitoring For Sex Offenders – Court-Determined Monitoring Period (AOC-CR-615)

Date 9/6/2007 *Signature* /s/ **SEAL**

Date Certified Copies Delivered To Sheriff 9/6/2007

☒ *Deputy CSC* ☐ *Assistant CSC*
☐ *Clerk Of Superior Court*

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STATE OF NORTH CAROLINA

No. 07CRS050503 51

BUNCOMBE County

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name Of Defendant
SMITH, CARLOS, FITZGERALD

Offense
POSSESSION OF FIREARM BY FELON

FELONY JUDGMENT
FINDINGS OF AGGRAVATING AND MITIGATING FACTORS
(STRUCTURED SENTENCING)

GS, 15A-1301, 15A-1340.1:

NOTE: *When consolidating offenses for judgment, findings of aggravating factors and mitigating factors should be made only for the most serious offense. Separate findings of aggravating factors and mitigating factors should be made for each offense that is not consolidated.*

AGGRAVATING FACTORS

1. The Defendant:

   a. induced others to participate in the commission of the offense.

   b. occupied a position of leadership or dominance of other participants in the commission of the offense.

2. The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

2a. The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.

3. The offense was committed for the purpose of:

   a. avoiding or preventing a lawful arrest.

   b. effecting an escape from custody.

4. The defendant was:

   a. hired to commit the offense.

   b. paid to commit the offense.

5. The offense was committed to:

   a. disrupt the lawful exercise of a governmental function or the enforcement of laws.

b. hinder the lawful exercise of a governmental function or the enforcement of laws.

6. The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker (*effective 12/1/05*), justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

7. The offense was especially heinous, atrocious or cruel.

8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

9. The defendant held public office at the time of the offense and the offense related to the conduct of the office.

10. The defendant:

a. was armed with a deadly weapon at the time of the crime.

b. used a deadly weapon at the time of the crime.

11. The victim was:

    a. very young.

    b. very old.

    c. mentally infirm.

    d. physically infirm.

    e. handicapped.

12. The defendant committed the offense while on pretrial release on another charge.

13. The defendant involved a person under the age of 16 in the commission of the crime.

14. The offense involved:

    a. an attempted taking of property of great monetary value.

    b. the actual taking of property of great monetary value.

    c. damage causing great monetary loss.

    d. an unusually large quantity of contraband.

15. The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

16. The offense involved the sale or delivery of a controlled substance to a minor.

16a. The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

16b. The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings. *(effective 1/15/06)*

17. The offense was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

18. The defendant does not support the defendant's family.

18a. The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B, C, D, or E felony if committed by an adult. The Court finds this aggravating factor beyond a reasonable doubt.

19. The victim of this offense suffered serous injury that is permanent and debilitating.

20. Additional findings of factors in aggravation:.

The Court accepts the defendant's admission to the aggravating factor(s) noted above and finds the supporting evidence to be beyond a reasonable doubt.

The jury finds these aggravating factors beyond a reasonable doubt.

☒ There are no findings of any aggravating factors.

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(Over)

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MITIGATING FACTORS

1. The defendant committed the offense under:

   a. duress which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

   b. coercion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

   c. threat which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

   d. compulsion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

2. The defendant:

   a. was a passive participant in the commission of the offense.

   b. played a minor role in the commission of the offense.

3. The defendant was suffering from a:

   a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

   b. physical condition that was insufficient to constitute a defense but significantly

reduced the defendant's culpability for the offense.

4. The defendant's:

   a. age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

   b. limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

5. The defendant has made:

   a. substantial restitution to the victim.

   b. full restitution to the victim.

6. The victim was more than 16 years of age and:

   a. was a voluntary participant in the defendant's conduct.

   b. consented to the defendant's conduct.

7. The defendant:

   a. aided in the apprehension of another felon.

   b. testified truthfully on behalf of the state in another prosecution of a felony.

8. a. The defendant acted under strong provocation.

b. The relationship between the defendant and the victim was otherwise extenuating.

9. The defendant:

a. could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear.

b. exercised caution to avoid serious bodily harm or fear to other persons.

10. The defendant reasonably believed that the defendant's conduct was legal.

11. The defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer:

a. at an early stage of the criminal process.

b. prior to arrest.

12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.

13. The defendant is a minor and has reliable supervision available.

14. The defendant has been honorably discharged from the United States Armed Services.

X 15. The defendant has accepted responsibility for the defendant's criminal conduct.

16. The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

X 17. The defendant supports the defendant's family.

X 18. The defendant has a support system in the community.

19 The defendant has a positive employment history or is gainfully employed.

20. The defendant has a good treatment prognosis and a workable treatment plan is available.

21. Additional written findings of factors in mitigation:

The Court makes no findings of any mitigating factors.

DETERMINATION

1. The Court finds that:

the State provided the defendant with appropriate notice of the aggravating factor(s) in this case.

the defendant waived any notice requirements as to the aggravating factor(s) in this case.

2. The Court finds that the State included in its criminal pleading the statement required by G.S. 15A-924(a)(7), if necessary.

3. The Court, having considered the evidence and arguments presented at the trial and sentencing hearing, and based on the admission(s) and findings of aggravating and mitigating factors as noted above, finds that

   the factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified.

   X the factors in mitigation outweigh the factors in aggravation and that a mitigated sentence is justified.

Date *Name Of Presiding Judge (Type Or Print)*
9/6/2007 JAMES U. DOWNS

Signature Of Presiding Judge
/s/ James U. Downs

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